2001

the State of Utah v. Pearl Topanotes : Brief of Appellee

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff/Respondent, Conditional Cross-Petitioner, v. PEARL TOPANOTES, Defendant/Petitioner, Conditional Cross-Respondent.	: : : : : : : : : : :	Case No. 20010127-SC Priority No. 13

BRIEF OF CONDITIONAL CROSS-RESPONDENT ON CERTIORARI REVIEW

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BRIEF OF CONDITIONAL-CROSS RESPONDENT

Petitioner and Conditional-Cross Respondent Pearl Topanotes is filing this "Brief of Conditional-Cross Respondent" in accordance with the Utah Rules of Appellate Procedure. Since the issue addressed herein is fairly included in the issues raised in Topanotes' "Brief of Petitioner" and "Reply Brief of Petitioner," Topanotes has incorporated herein by reference relevant portions of those Briefs. See Utah R. App. P. 24(h) (allowing an appellee or an appellant in a case involving multiple parties to "adopt by reference any part" of a brief that has been filed with the court).

JURISDICTIONAL STATEMENT AND OPINION BELOW

This Court granted Topanotes' Petition for Writ of Certiorari to the Utah Court of Appeals in State v. Topanotes, 2000 UT App 311, 14 P.3d 695. It also granted the state's conditional Cross-Petition for Writ of Certiorari. Jurisdiction is conferred on this Court pursuant to Utah Code Ann. § 78-2-2(3)(a) and (5) (1996).

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

The issue presented for review is as follows:

Whether the state is able to establish application of the inevitable-discovery doctrine, where the officers in this case unlawfully detained Topanotes as part of their "routine" and "common" practice.

STANDARD OF REVIEW: On certiorari, this Court adopts the same standard of review used by the court of appeals: questions of law are reviewed for correctness, and findings are reversed only if clearly erroneous. State v. Leyva, 951 P.2d 738, 741 (Utah 1997) (cite omitted). The court of appeals reviewed the issues on appeal in this case as follows: "'[T]he determination of whether an encounter with law enforcement officers constitutes a seizure under the Fourth Amendment . . . is a legal conclusion that we review for correctness.'" State v. Topanotes, 2000 UT App 311, ¶4 (citing Salt Lake City v. Ray, 2000 UT App 55, ¶8, 998 P.2d 274).

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

The following provision will be determinative of the issue presented for review: U.S. Const. amend. IV. The text of that provision is contained in Addendum A hereto.

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings, Disposition in the Court Below.

The "Statement of the Case" as set forth in Topanotes' Brief of Petitioner at 3-5 is incorporated herein by this reference. This Court also granted the state's conditional "Cross-

Petition for Writ of Certiorari." (Order, dated July 18, 2001.)

STATEMENT OF FACTS

The "Statement of Facts" as set forth in Topanotes' Brief of Petitioner at 5-8 is incorporated herein by this reference. Additional facts relevant to the issue presented herein are as follows:

The state in this case admits that Officer Hansen and Officer Mitchell unlawfully detained Topanotes in connection with a warrantless search (see State's Brief of Respondent ("Brief of Respondent") at 2, 19 (the officers' "detention was not justified by reasonable suspicion"; the "detention engendered by retaining [Topanotes'] identification [for the purpose of the warrants check] was not justified under the Fourth Amendment")). During the unlawful detention, the officers discovered a controlled substance in Topanotes' pocket. Topanotes, 2000 UT App 311, ¶2.

Notwithstanding the state's admission, the state claims the substance discovered during the unlawful detention is admissible against Topanotes under the inevitable-discovery doctrine. (Brief of Respondent at 14-21.)

In support of that doctrine, the state must prove that Officer Hansen and Officer Mitchell inevitably or ultimately would have discovered the controlled substance in this case through lawful means. See Nix v. Williams, 467 U.S. 431 (1984). The state is unable to make that showing here.

In this case, the evidence refutes application of the inevitable-discovery doctrine. (See R. 88.) Both Officer Hansen and Officer Mitchell testified that they detained Topanotes

without reasonable suspicion in order that they could run a warrants check. (R. 88:15-16, 21-22.) Both officers also testified that the manner in which they conducted the warrants check here constituted their "routine" or "common" practice. (Id. at 15-16, 21-22, 28.) By their own admissions, these officers routinely violated the law to conduct a warrants check.

The inevitable-discovery doctrine is inapplicable to this case.

SUMMARY OF THE ARGUMENT

Evidence is admissible under the inevitable-discovery doctrine if the state is able to prove by a preponderance of the evidence that officers ultimately would have discovered unlawfully seized evidence through lawful means. The state claims the inevitable-discovery doctrine is applicable here based on hypothetical facts, and based on proof of "predictable police routine." (Brief of Respondent at 16.) Hypothetical facts and circumstances are insufficient to support application of the doctrine. In addition, the "routine procedure" used by the officers in this case was unconstitutional. The state's argument for application of the inevitable-discovery doctrine must be rejected.

ARGUMENT

THE INEVITABLE-DISCOVERY DOCTRINE IS INAPPLICABLE HERE.

A. THE EXCLUSIONARY RULE.

The Fourth Amendment to the United States Constitution provides the following:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Pursuant to the law, if an officer engages in conduct in violation of a citizen's rights under the Fourth Amendment and discovers evidence of crime in connection therewith, the evidence obtained by virtue of the illegal police activity "must be suppressed at trial." State v. James, 2000 UT 80, ¶14, 13 P.3d 576; see also Nix v. Williams, 467 U.S. 431, 441 (1984) (recognizing the genesis of the exclusionary rule in the search and seizure context); State v. Hodson, 907 P.2d 1155, 1159-60 (Utah 1995) (suppressing unlawfully seized evidence).

The exclusionary rule serves a legitimate function. It removes the incentive for police officers to engage in unlawful conduct under the Fourth Amendment.

> The core rationale consistently advanced by this Court for extending the exclusionary rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections. This Court has accepted the argument that the way to ensure such protections is to exclude evidence seized as a result of such violations notwithstanding the high social cost of letting persons obviously guilty go unpunished for their crimes. On this rationale, the prosecution is not to be put in a better position than it would have been in if no illegality had transpired.

Nix, 467 U.S. at 442-43.

In this case, the state admits that Officer Hansen and Officer Mitchell violated Topanotes' Fourth Amendment rights when they unlawfully detained her and retained possession of her identification to run a warrants check. (Brief of Respondent at 2.) The unlawful conduct facilitated the search and the seizure of a controlled substance that gave rise to the charge in this case. The officers testified that the procedure they used to run the warrants check was routine or common practice. (R. 88:15-16, 21-22, 28.)

Where the officers here specifically circumvented Fourth Amendment law without regard for Topanotes' rights, the exclusionary rule must apply in this case. The evidence obtained in connection with the officers' unlawful conduct must be suppressed.

B. THE INEVITABLE-DISCOVERY DOCTRINE.

The inevitable-discovery doctrine is a limited exception to the exclusionary rule. Under that doctrine, the prosecution must establish by a preponderance of the evidence that the information discovered during an unlawful search "ultimately or inevitably would have been discovered by lawful means." Nix, 467 U.S. at 444; James, 2000 UT 80, ¶16. "[I]f the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings." Nix, 467 U.S. at 447.

The inevitable-discovery doctrine is a fact-intensive doctrine. It relies on "demonstrated historical facts capable of ready verification or impeachment." Id. at 444 n.5 "Historical facts" are facts that are admitted and established in evidence. See Ornelas v. U.S., 517 U.S. 690, 696 (1996); Thompson v. Keohane, 516 U.S. 99, 109-10 (1995).

Before the inevitable-discovery doctrine may apply in a case, the government must prove that absent the illegality, the officer certainly and ultimately would have found the evidence. Stated another way, the state must establish by a preponderance of the evidence that the items in issue would have been discovered shortly (inevitably) through lawful means already under way. U.S. v. Romero, 692 F.2d 699, 703-04 (10th Cir. 1982) ("Under the

inevitable-discovery exception, unlawfully seized evidence is admissible if there is no doubt that the police would have lawfully discovered the evidence later"; although officer exceeded the scope of the pat-down search when he reached into defendant's pocket to retrieve drugs, the evidence was admissible since separate circumstances provided probable cause for an arrest and an "inevitable" search "incident" thereto); Nix, 467 U.S. at 448-449 (evidence supported that the officers would have discovered the child's body shortly through lawful means already in process); U.S. v. Larsen, 127 F.3d 984, 987 (10th Cir. 1997), cert. denied, 522 U.S. 1140 (1998) (although the unlawfully seized documents could be suppressed, FBI would have learned of fraud (and did learn of fraud) through documents received from bank vice-president); Brief of Petitioner at Point I.B.; Reply Brief of Petitioner at subpoint C.

In establishing inevitable discovery, "[i]t is not enough to show that the evidence 'might' or 'could have been' otherwise obtained." State v. Miller, 709 P.2d 225, 241 (Or. 1985), cert. denied, 475 U.S. 1141 (1986). Likewise, the inevitable-discovery doctrine "involves no speculative elements." Nix, 467 U.S. at 444 n.5.

C. THE STATE RELIES ON SPECULATION IN THIS CASE FOR APPLICATION OF THE INEVITABLE-DISCOVERY DOCTRINE.

In this matter, the state claims the inevitable-discovery doctrine should apply based on hypothetical events and possibilities. (See Brief of Respondent at 16.)

According to the state, the encounter between Topanotes and the officers began as a level-one consensual encounter. (See Brief of Respondent at 17); see State v. Deitman, 739 P.2d 616, 617-18 (Utah 1987) (under a level-one encounter "an officer may approach

a citizen at [any time] and pose questions so long as the citizen is not detained against his will"). The state claims that during the consensual encounter, the officers were entitled to ask Topanotes for identification. (See Brief of Respondent at 17.)

The state also claims that once the officers obtained Topanotes' identification information, they were entitled to run a warrants check on her. (Brief of Respondent at 18); but see State v. Johnson, 805 P.2d 761, 764 (Utah 1991) (the leap from asking a person's name and date of birth to running a warrants check severed the chain of rational inference from specific and articulable facts and degenerated into an attempt to support an as yet "inchoate and unparticularized suspicion or 'hunch'" in violation of the Fourth Amendment).

Under the state's hypothetical scenario, to be lawful, Officer Hansen was required to promptly return the identification card to Topanotes after he reviewed it. Also, under the hypothetical, since the officers theoretically engaged in a level-one encounter, once Hansen promptly returned the card, Topanotes was free to go. See Deitman, 739 P.2d at 617-18.

Assuming arguendo the state is correct in that an officer may run a warrants check so long as a citizen is free to go, the state's argument in this case fails where the evidence reflects that officers detained Topanotes and retained possession of her identification card "for the duration of the warrants check" without reasonable articulable suspicion in violation of the Fourth Amendment. (Brief of Respondent at 18); Deitman, 739 P.2d at 617-18 (a level-two detention must be supported by reasonable suspicion); Topanotes, 2000 UT App 311, ¶¶6-8. The officers testified that the manner in which they conducted the unlawful warrants check in this case was "routine" or "common practice." (R. 88:15-16, 21-22, 28.)

In addition, the record in this case fails to support that the officers ever considered returning Topanotes' identification to her before they ran the warrants check. Indeed, even if the parties were to assume for purposes of this appeal that the officers could testify that they considered returning Topanotes' card prior to the warrants check, that testimony would be irrelevant. In this case, there was only one warrants check. Whatever the officers contemplated in connection with that check became immaterial once they unlawfully detained Topanotes for the purpose of the check. In short, the record in this case could never support that the officers "*would*" have run a warrants check through lawful means, once they already conducted the check through unlawful means. (See R. 88.)[1]

Under the facts of this case, Topanotes is entitled to suppression of the unlawfully seized evidence. See Hodson, 907 P.2d at 1159-60.

The state disagrees and is undeterred by the lack of evidence in this case to support an "inevitable," "lawful" discovery. Indeed, in support of its claim for application of the

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[1] Imagine an officer who bursts into an empty apartment that he has kept under surveillance for drug activity. Imagine also that the officer discovers drugs and subsequently arrests a person in connection therewith. At the motion to suppress hearing, the state may have a difficult time establishing probable cause and exigent circumstances to support the officer's warrantless burst into the empty apartment. Even if the officer testified at the motion to suppress hearing that he could have requested consent to search or that he contemplated obtaining a warrant for the apartment, his testimony would be immaterial. See State v. Lopez, 873 P.2d 1127, 1136-37 (Utah 1994) (under Fourth Amendment analysis, an officer's state of mind is irrelevant); State v. Barnes, 978 P.2d 1131, 1135 (Wash. App. 1999) (officer's belief is immaterial). The damage has already been done. The officer is not able to go back in time to recreate events that "ultimately" "would" lead to the search through "lawful means" when he took no measures to pursue those means. Under that scenario, the inevitable-discovery doctrine should not apply.

inevitable-discovery doctrine, the state essentially urges this Court to disregard the officers' unlawful conduct and to consider what "could" (Brief of Respondent at 20) have happened if the officers had promptly returned Topanotes' identification to her: "If police here had merely viewed the identification, obtained the desired information, and promptly returned it, the warrants check would not have 'per se escalate[d] the encounter into a level two stop.'" (Brief of Respondent at 18.) According to the state, "[H]aving verified petitioner's name, the preponderance of the evidence demonstrates that police could and would have run the warrants check with or without retaining the identification (R88:16). Police would have thus learned of petitioner's outstanding warrants, even absent the illegality. *See Larsen*, 127 F.3d at 986; *Miller*, 709 P.2d at 242." (Brief of Respondent at 20.)

The state's argument supplants the requirement set forth in Nix for "historical facts capable of ready verification or impeachment" (Nix, 467 U.S. at 444 n.5) with revisionist history. The state proposes to re-write history in this case to suit its purpose. That is inappropriate. Furthermore, the state's argument for application of the inevitable-discovery doctrine must be rejected for the following reasons.

First, the state claims that evidence of "predictable police routine" may support application of the inevitable-discovery doctrine. (Brief of Respondent at 16.) In this case, the evidence of "routine procedure" or "common practice" consisted of unconstitutional tactics. That is, the officers in this case testified that as a matter of "routine" or "common" practice, they detained Topanotes in this case without reasonable suspicion in order to run

a warrants check. The officers' unlawful conduct here was "a matter of routine procedure" (R. 88:16); "[i]t's common practice" (R. 88:22); and "it wasn't because [officers] had observed Ms. Topanotes doing anything criminal or suspicious" (R. 88:28).

Because the officers in this case circumvented the law as a matter of "routine" practice, the inevitable-discovery doctrine is inapplicable. See Nix, 467 U.S. at 444 (prosecution must establish that information ultimately would have been discovered through "*lawful means*"); also Brief of Petitioner at Point I.B; Reply Brief of Petitioner at subpoint C. In short, the state cannot establish a "lawful" "routine" practice in this case.

Second, the state's argument for application of the inevitable-discovery doctrine is based on speculative possibilities. According to the state, because a warrants check may be conducted at any time, police in this case "could" have conducted a check without engaging in an unlawful level-two detention. (Brief of Respondent at 20.) That is insufficient to support application of the doctrine. Miller, 709 P.2d at 241 ("[i]t is not enough to show that the evidence 'might' or 'could have been' otherwise obtained"); Brief of Petitioner at Point I.B.; Reply Brief of Petitioner at subpoint C.

The inevitable-discovery doctrine "involves no speculative elements." Nix, 467 U.S. at 444 n.5. Thus, it cannot apply in this matter.

Third, the state's argument for application of the inevitable-discovery doctrine is unpredictable and raises more questions than answers. By way of explanation, the evidence in this case supports that Officer Hansen requested and retained Topanotes' identification card, then he handed it to Officer Mitchell for a warrants check. (R. 88:14, 21-22.)

While the state claims the officers "could" have run a warrants check "without retaining [the] identification [card]" (Brief of Respondent at 20), that assertion raises the following questions: If *Officer Hansen* requested the identification card and hypothetically returned it to Topanotes, how did *Officer Mitchell* obtain identification information to run the warrants check? Under the state's hypothetical, are we to assume that *Officer Hansen* ran the warrants check since he requested the identification information from Topanotes? If *Officer Mitchell* ran the warrants check (as he did under the facts in this case), how did he obtain the identification information for that purpose if Officer Hansen promptly returned the identification card to Topanotes? See Johnson, 805 P.2d at 764 (the leap from asking a person's name to running a warrants check severed the chain of rational inference from specific and articulable facts and degenerated into an attempt to support an as yet "inchoate and unparticularized suspicion or 'hunch'" in violation of the Fourth Amendment).

Next, when Officer Hansen hypothetically returned the identification card to Topanotes, was she free to go? If so, did she? If she left, did she go home or to a friend's house? If she left, the evidence of record in this case supports that the officers *would not* have conducted the warrants check.

Indeed, the only evidence on the matter supports that if Topanotes had ended the encounter when she was free to go, the officers would have proceeded on their way without any further investigation relating to Topanotes. Officer Hansen testified as follows:

> [PROSECUTOR]: And if she had said to you, I don't want to talk to you, what would you have done?

[OFFICER HANSEN]: Well, I may have asked her to talk to me again and tried to be real nice about it, but there isn't much else I can do.

[PROSECUTOR]: So if you asked very nicely, Please, and she said, No, I won't talk to you, what would you have done?

[OFFICER HANSEN]: I would have gone back out to North Temple and done what we were doing before.

[PROSECUTOR]: And ended the encounter with Ms. Topanotes?

[OFFICER HANSEN]: Yes.

(R. 88:17.) The record refutes that absent the unlawful detention the officers inevitably "would" have conducted a check leading to the arrest and search at issue in this case.

Even if officers "could" have run a warrants check without the unlawful detention, it is speculative to claim that they would have done so. In addition, assuming arguendo the officers could run a lawful check without detaining Topanotes, "[there was no testimony that the officers would have been able to quickly locate" Topanotes after a warrants check since she was free to go, or that she "still would have had narcotics and paraphernalia on [her] person at the time of any such later encounter." State v. Warren, 2001 UT App 346, ¶20, 37 P.3d 270, (*petition for cert. filed on other grounds)*, Case No. 20020002SC.

The state's hypothetical is uncertain and unpredictable. Without the detention, there is nothing to suggest that the search *inevitably would* have occurred, or that officers *would* have discovered the controlled substance. "[T]here is absolutely no evidence in the record that would sustain findings in support of a determination that discovery of the drugs and paraphernalia on [defendant's] person would have been inevitable, along the lines theorized

by the State on appeal, even [absent the illegality]." Warren, 2001 UT App 346, ¶20. This case does not lend itself to application of the inevitable-discovery doctrine. See Reply Brief of Petitioner at subpoint C.

Finally, the facts in this case compel application of the exclusionary rule. The core rationale for applying the exclusionary rule is to deter police from violating a citizen's constitutional rights. From a policy standpoint, the exclusionary rule should apply here.

Where the officers in this case routinely and commonly engaged in a warrants check as described herein, that is unconstitutional. Officer Mitchell and Officer Hansen may only begin to comprehend the illegal nature of the routine practice if the exclusionary rule is applied to the fruits of the unlawful search. The exclusionary rule would deter these officers from engaging in unlawful detentions as described herein, and it would remove all incentive for the officers to make such unlawful seizures common place. In short, this is a case for application of the exclusionary rule. See Brief of Petitioner, dated October 4, 2001, at Point I.B. The evidence obtained in connection with the unlawful level-two detention must be suppressed.

CONCLUSION

As set forth herein, and as further set forth in the Brief of Petitioner and the Reply Brief of Petitioner, Topanotes respectfully requests that this Court reject the state's argument for application of the inevitable-discovery doctrine to this case.

SUBMITTED this 29th day of March, 2002.

LINDA M. JONES
RALPH DELLAPIANA
Attorneys for Pearl Topanotes

CERTIFICATE OF DELIVERY

I, LINDA M. JONES, hereby certify that I have caused to be hand-delivered 10 copies of the foregoing to the Utah Supreme Court, 450 South State Street, Salt Lake City, Utah 84114, and 4 copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 29th day of March, 2002.

LINDA M. JONES

DELIVERED to the Supreme Court and the Attorney General's office as set forth above, this ___ day of _____, 2002.

_____

ADDENDUM A

CONSTITUTION OF THE UNITED STATES

AMENDMENT IV

[Unreasonable searches and seizures.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.